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**DISTRICT COURT OF  
CLARK COUNTY, NEVADA**

CANNABIS EQUITY AND INCLUSION  
COMMUNITY (CEIC), a domestic  
nonprofit corporation; ANTOINE POOLE,  
an individual,

Petitioners/Plaintiffs,

vs.

STATE OF NEVADA ex rel. BOARD OF  
PHARMACY, a public entity of the State  
of Nevada

Respondent/Defendant.

Case No. A-22-851232-W

Dept. No. 15

Hearing Date: July 13, 2022

Hearing Time: 9:00 AM

**RESPONDENT/DEFENDANT'S REPLY MEMORANDUM OF POINTS AND  
AUTHORTIES ON MOTION TO DISMISS FOR LACK OF JURISDICTION AND  
FAILURE TO STATE A CLAIM**

Respondent/Defendant State of Nevada ex rel. Board of Pharmacy (“Board”), by and through its attorneys, Brett Kandt, General Counsel, and Peter K. Keegan, Assistant General Counsel, hereby submits this reply memorandum of points and authorities on the Board’s motion to dismiss Petitioners/Plaintiffs Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief (“Petition”). This reply is made pursuant to EDCR 2.20(g).

1 **I. INTRODUCTION**

2 Plaintiffs Cannabis Equity and Inclusion Community (“CEIC”) and Antoine Poole  
3 fail to rebut the crux of the Board’s motion: 1) that the *Nevada Medical Marijuana*  
4 *Initiative*, Nev. Const. art. IV, § 38, does not compel the deletion of marijuana, cannabis  
5 and cannabis derivatives (hereinafter “marijuana”) from the list of Schedule I controlled  
6 substances; 2) that the *Nevada Marijuana Legalization Initiative* did not divest the Board  
7 of jurisdiction over the scheduling of marijuana as a controlled substance; and 3) deleting  
8 marijuana from Schedule I will not redress their alleged injuries. Plaintiffs’ opposition  
9 largely deflects from these realities.

10 **II. ARGUMENT**

11 **A. A motion to dismiss is a proper responsive motion to a petition for**  
12 **writ of mandamus.**

13 Plaintiffs initially throw a red herring by arguing that a motion to dismiss a writ  
14 petition “is an improper responsive pleading and is not contemplated under the governing  
15 statutory scheme.” Opposition at 2:9-10; 5:8-12. This belies the dictate of NRS 34.300 that  
16 “[e]xcept as otherwise provided . . . the provisions of NRS and Nevada Rules of Civil  
17 Procedure relative to civil actions in the district court are applicable to and constitute the  
18 rules of practice in (mandamus) proceedings.” “[A] proceeding in mandamus, under our  
19 practice act regulating the same, is a civil remedy, with the qualities and attributes of a  
20 civil action.” *State ex rel. Bullion & Exch. Bank v. Mack*, 26 Nev. 430, 441, 69 P. 862, 863  
21 (1902).

22 Furthermore, Plaintiffs stipulated to the Board filing a motion to dismiss prior to  
23 filing an answer to the Petition in the First Stipulation and Order Setting Briefing  
24 Schedule entered by the Court on June 1, 2022.

25 **B. Nev. Const. art. IV, § 38 does not compel the deletion of marijuana**  
26 **from Schedule I.**

27 Nev. Const. art. IV, § 38(1)(a) mandates that “[t]he legislature shall provide by law  
28 for . . . [t]he use by a patient, *upon the advice of his physician*, of a plant of the genus

1 Cannabis for the treatment or alleviation of” various medical conditions. (Emphasis  
2 added). In the intervening twenty-two years since enactment the Legislature has never  
3 deemed the deletion of marijuana from the list of Schedule I controlled substances  
4 necessary to carrying out that constitutional mandate. Nev. Const. art. IV, § 38 itself is  
5 predicated on the Legislature delineating between lawful and unlawful use. The will of  
6 voters that marijuana be authorized for a patient’s medical use “upon the advice of a  
7 physician” under limited circumstances and subject to significant restrictions has been  
8 fully honored.

9 Plaintiffs do not allege that they have been prevented from using marijuana in  
10 conformance with Nev. Const. art. IV, § 38. Rather, they mistakenly equate the right of a  
11 patient to use marijuana “upon the advice of a physician” to marijuana having “accepted  
12 medical use in treatment in the United States” to fabricate a conflict between Nev. Const.  
13 art. IV, § 38 and NRS 453.166(2). They do so in a bid to have criminal convictions for  
14 unlawful acts falling outside the scope of Nev. Const. art. IV, § 38 overturned.

15 However, the constitutional right to use marijuana “upon the advice of a physician”  
16 in Nevada does not establish that marijuana has “accepted medical use in treatment in the  
17 United States” that precludes its continued designation in Schedule I. Undoubtedly a  
18 patient “is fully entitled to rely upon the physician's professional skill and judgment while  
19 under his care.” *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Nevertheless,  
20 on the national level all states recognize marijuana as a Schedule I controlled substance  
21 under federal law, even as 37 states and the District of Columbia now authorize its medical  
22 use.<sup>1</sup>

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24 <sup>1</sup> Alabama Code Chapter 20 Article 2A; Alaska Stat. 17.37.10, et seq.; Arizona Rev.  
25 Statutes 36-2801, et seq.; Arkansas Const. of 1874: Amendment 98, section 1, et seq.;  
26 California Health and Safety Code: Section 11362.5, et seq.; Colorado Const. Article XVIII  
27 14; Connecticut Gen. Statutes: Title 21A, Section 21a-408, et seq.; Delaware Code: Title 16,  
28 Section 4901A, et seq.; D.C. Code Ann. 7-1671.01, et seq.; Florida Statutes: Title XXIX,  
Section 381.986, et seq.; Hawaii Rev. Statutes: Section 329-121, et seq.; Illinois  
Statutes: Chapter 410, Section 130/1, et seq.; Louisiana Rev. Statutes: Title 40, Section  
1046, et seq.; Maine Rev. Statutes: Title 22, Section 2421, et seq.; Code of Maryland  
Regulations: Chapter 10, Section 62.01, et seq.; Code of Massachusetts Regulations: 105

1 As previously noted, NRS 453.2182 mandates that, in the absence of any objection,  
2 the Board *shall* designate a Schedule I controlled substance consistent with federal law  
3 without making the findings required by NRS 453.166. Plaintiffs correctly point out that  
4 marijuana was designated in Schedule I by the Legislature with enactment of the Uniform  
5 Controlled Substances Act, codified as NRS Chapter 453, in 1971, prior to the enactment  
6 of NRS 453.2182. Plaintiffs also correctly note that the Board is not mandated to follow  
7 federal law when scheduling, rescheduling or deleting a controlled substance, provided the  
8 Board makes the determinations required under NRS 453.146. Nevertheless, Plaintiffs  
9 seek to circumvent this statutory administrative rulemaking process altogether through  
10 their Petition.

11 In the intervening twenty-two years since the enactment of Nev. Const. art. IV, § 38  
12 the Board has regularly reviewed and amended the list of Schedule I substances in NAC  
13 639.510 in conformance with NRS 453.211. Never in that time have Plaintiffs – or *any*  
14 party – objected to the listing of marijuana in Schedule I or otherwise petitioned the Board  
15 pursuant to NAC 639.140 for reconsideration of the scheduling of marijuana in light of the  
16 amendment to the Nevada Constitution.<sup>2</sup> Plaintiffs now would have the Court make  
17 determinations that are legislatively delegated to the Board. *See Sheriff, Clark Cty. v.*  
18 *Luqman*, 101 Nev. 149, 153-54, 697 P.2d 107, 110 (1985). Mandamus will not lie “when  
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20 CMR 725.001, et seq.; Michigan Compiled Laws: Chapter 333, Section 26421, et seq.;  
21 Minnesota Statutes §§152.22-152.37; Mississippi Medical Cannabis Act, SB 2095 (2022);  
22 Missouri Const. Article XIV; Montana Code Annotated: Title 50, Section 46-301, et seq.;  
23 New Hampshire Rev. Statutes: Title X, Chapter 126-X.; New Jersey Statutes: Title 24,  
24 Section 6I-1, et seq.; New Mexico Statutes: Chapter 26, Section 2B-1, et seq.; New York  
25 Consolidated Laws: PBH Section 3360, et seq.; North Dakota Century Code: Title 19,  
26 Section 24.1-01, et seq.; Ohio Rev. Code: Title XXXVII, Section 3796.01, et seq.; 63  
27 Oklahoma Statutes Supp.2019, §§ 427.1--427.23; Oregon Rev. Statutes: Section 475B.400.;  
28 35 Pennsylvania Cons. Stat. Chapter 64; Rhode Island General Laws: Title 21, Chapter  
28.6-1, et seq.; South Dakota Codified Laws Chapter 34-20G; Utah Code 26-61a; Vermont  
Statutes: Title 18, Section 4471, et seq.; Code of Virginia §§54.1-3442.5-3442.8;  
Washington Rev. Code: Title 69, Section 51A.005, et seq.; W.Va. Code Chapter 16A.

<sup>2</sup> This refutes the notion that Plaintiffs have no plain, speedy, and adequate remedy  
at law and calls into question their inexcusable delay in seeking redress.

1 the duty imposed requires deliberation and decision upon facts presented.” *Douglas Cty.*  
2 *Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669, 671 (1962).

3 **C. The Nevada Marijuana Legalization Initiative did not divest the**  
4 **Board of jurisdiction over the scheduling of marijuana as a controlled**  
5 **substance.**

6 Plaintiffs’ ultimate motive is revealed in their argument that with the subsequent  
7 passage of the *Nevada Marijuana Legalization Initiative* the Board was effectively divested  
8 of jurisdiction over the scheduling of marijuana as a controlled substance altogether.  
9 Petition at 10:11-15 (¶31); 12:13-14 (¶43); 15:5-7 (¶62); 16-18 (¶¶A and B); Opposition at  
10 22:17-24:21. Plaintiffs’ endgame is clear: that marijuana no longer be regulated as a  
11 controlled substance under Nevada law, even in Schedule II, III, IV or V.<sup>3</sup>

12 Despite Plaintiffs’ assertions to the contrary, under the current statutory scheme set  
13 forth in Title 56 of the Nevada Revised Statutes, to the extent marijuana was legalized for  
14 adult recreation use by the *Nevada Marijuana Legalization Initiative*, it is “regulated in a  
15 manner similar to alcohol” consistent with Section 2 of that initiative. Regulatory oversight  
16 and enforcement of the lawful use of marijuana authorized by both ballot initiatives now  
17 lies with the Cannabis Compliance Board, even as the Board retains jurisdiction over the  
18 scheduling of controlled substances under NRS Chapter 453.

19 Once again, the *Nevada Marijuana Legalization Initiative* itself delineated between  
20 lawful and unlawful use. Once again, in the course of implementing and amending that  
21 statutory scheme the Legislature has never deemed it necessary to deschedule marijuana  
22 or divest the Board of its authority under NRS Chapter 453 to schedule marijuana. Once  
23 again, the will of the voters that marijuana be authorized for adult recreational use under  
24 limited circumstances and subject to significant restrictions has been fully honored. Once

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26 <sup>3</sup> See NRS 453.176 (Schedule II tests); NRS 453.186 (Schedule III tests); NRS  
27 453.196 (Schedule IV tests); NRS 453.206 (Schedule V tests) – a substance with accepted  
28 medical use in treatment in the United States is still subject to listing in one of these  
schedules based upon the potential for abuse and resulting physical or psychological  
dependence.

1 again, Plaintiffs do not allege that they have been prevented from using marijuana in  
2 conformance with the *Nevada Marijuana Legalization Initiative*. Once again, Plaintiffs  
3 essentially seek a “Get Out of Jail Free” card that was never contemplated by either ballot  
4 initiative.

5 **D. Granting Plaintiffs their requested relief will not redress their**  
6 **alleged injuries.**

7 Plaintiffs repeatedly assert that the relief they seek is a writ or order directing the  
8 Board to remove marijuana from the list of Schedule I controlled substances in NAC  
9 453.510. Petition at 2:1-4; 13:8-10 (¶49); 14:20-21 (¶49); 15:1-10 (¶62); 16-18 (¶¶A and B);  
10 Opposition at 3:11-12; 23:8-9. Plaintiffs essentially seek to decriminalize conduct clearly  
11 proscribed by the Uniform Controlled Substances Act, a proposition previously rejected by  
12 the Nevada Supreme Court in *Luqman*. 101 Nev. at 157, 697 P.2d at 112-13. Even so, this  
13 will not redress their alleged injuries.

14 Plaintiffs allege that “individuals continue to be prosecuted for violating Nevada  
15 statutes which rely on the scheduling of marijuana, cannabis and cannabis derivatives as  
16 Schedule I substances.” Petition at 14:16-18 (¶59). However, several of the relevant  
17 statutes do not even rely upon marijuana being scheduled as a controlled substance. NRS  
18 453.339 prohibits the trafficking of marijuana specifically.<sup>4</sup> NRS 453.3393 prohibits the  
19 unlawful production of marijuana specifically.<sup>5</sup> NRS 453.336(4) prohibits the unlawful  
20 possession of 1 ounce or less of marijuana specifically.

21 NRS 453.336(1) prohibits the unlawful possession of *any* controlled substance and is  
22 not limited to Schedule I. NRS 202.360 prohibits the unlawful possession of a firearm by

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24 <sup>4</sup> NRS 453.339(1) states in pertinent part: “a person who knowingly or intentionally  
25 sells, manufactures, delivers or brings into this State or who is knowingly or intentionally  
26 in actual or constructive possession of *marijuana or concentrated cannabis* shall be  
27 punished . . . .” (Emphasis added).

28 <sup>5</sup> NRS 453.3393(1) states in pertinent part: “A person shall not knowingly or  
intentionally manufacture, grow, plant, cultivate, harvest, dry, propagate or process  
*marijuana*, except as specifically authorized by the provisions of this chapter or chapter  
453A of NRS.” (Emphasis added).

1 a person who “unlawfully” uses *any* controlled substance and is not limited to Schedule I;  
2 moreover, the prohibition does not apply to a person “lawfully” using marijuana in  
3 conformance with NRS Chapters 678C or 678D. These prohibitions apply to all controlled  
4 substances, and persons convicted of these offenses will not benefit from a judicial  
5 determination that the current listing of marijuana in Schedule I is unconstitutional.<sup>6</sup>

6 Plaintiff Poole’s alleged injury, that he was convicted of a controlled substance-  
7 related offense after the enactment of Nev. Const. art. IV, § 38 (Petition at 4:1-6 (¶1; 6:1-4  
8 (¶10), can only be redressed by descheduling marijuana altogether.<sup>7</sup> Descheduling  
9 marijuana altogether will not even fully redress the alleged injuries of those CEIC members  
10 with prior criminal convictions for offenses specific to marijuana. By virtue of the lack of  
11 redressability, these Plaintiffs lack standing.

12 **E. CEIC has failed to establish associational standing, organizational**  
13 **standing or standing under the public-importance doctrine.**

14 Since CEIC members with prior marijuana-related criminal convictions cannot  
15 establish standing in their own right, they cannot afford CEIC associational standing. The  
16 Petition similarly fails to demonstrate the redressability necessary to establish standing  
17 for CEIC’s members seeking to be licensed in the cannabis industry. The alleged injuries  
18 to CEIC’s members are impermissibly generalized and CEIC’s interests are so marginally  
19 related to the listing of marijuana as a Schedule I controlled substance that any  
20 redressability to CEIC or its members by way of its requested relief remains speculative.  
21 *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 (9th Cir.  
22 2004).

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23 <sup>6</sup> NRS 453.337 does prohibit the unlawful possession for the purpose of sale any  
24 controlled substance classified in schedule I or II; however, the unlawful possession of  
25 marijuana for the purpose of sale is clearly proscribed under both ballot initiatives and  
implementing legislation.

26 <sup>7</sup> Poole alleges that May 20, 2016, was the date of his arrest for possession of  
27 marijuana in violation of NRS 453.336 (Opposition at 10:5-7), *prior* to enactment of the  
28 *Nevada Marijuana Legalization Initiative*; his subsequent conviction *after* enactment of  
that ballot initiative is moot.

1 Plaintiffs reframe their statement of CEIC’s mission in their opposition in an effort  
2 to salvage their argument that they have organizational standing. The Petition expressly  
3 states that as part of its two-fold mission, in addition to assisting members of  
4 underrepresented communities to become licensed in the cannabis industry:

5 CEIC has also dedicated resources to mitigating Nevada’s long history of  
6 prosecuting cannabis-related offenses by assisting individuals with prior  
7 cannabis-related criminal convictions in applying for pardons and sealing  
8 criminal records. CEIC continues to engage in community outreach to identify  
9 these individuals and organize record sealing workshops.

10 Petition at 3:21-24 (¶1).

11 The Petition does not allege that any of the individuals that CEIC assists in this  
12 regard are actually seeking to be licensed in the cannabis industry. The Petition makes no  
13 mention of *diverting* resources to combat the Board’s conduct that would have otherwise  
14 been utilized in furtherance of this mission. The opposition now nonsensically claims that  
15 CEIC is diverting resources from its stated mission in order to further its stated mission.  
16 Opposition at 13:14-19. CEIC cannot conjure up an involuntary injury-in-fact to its  
17 activities; consequently, CEIC lacks organizational standing. If courts “were to allow a  
18 party whose organizational mission is to engage in policy advocacy to claim injury on the  
19 basis of a need to engage in that exact activity, *any* advocacy group could find standing to  
20 challenge laws when there are changes in policy." *Women's Student Union v. United States*  
21 *Dep't of Educ.*, No. 21-cv-01626-EMC, 2021 U.S. Dist. LEXIS 167220, at \*15-17 (N.D. Cal.  
22 Sep. 2, 2021) (citations omitted).

23 Finally, in a last-ditch effort to establish standing, CEIC argues the public-  
24 importance exception recently expanded by the Nevada Supreme Court in *Nev. Pol'y Rsch.*  
25 *Inst., Inc. v. Cannizzaro*, 507 P.3d 1203 (Nev. 2022). However, CEIC cannot even make a  
26 facially valid argument that the exception applies. Although generally the public-  
27 importance exception “requires that the plaintiff challenge a legislative expenditure or  
28 appropriation as violating a specific provision of the Nevada Constitution” the Court  
extended the exception to cases “where a party seeks to protect the essential nature of ‘a  
government in which the three distinct departments, . . . legislative, executive, and judicial,





